



the arguments advanced involve the same or similar legal issues and since the parties ultimately addressed these three Motions in joint memoranda, the Court does the same in this Omnibus Order, and decides the Motions without a hearing pursuant to Fed. R. Civ. P. 78(b) and E.D. Va. Local Civil Rule 7(J).

#### A. Legal Standard

This Court has previously noted: “[a]lthough not specifically provided for in the Federal Rules of Evidence, motions in limine ha[ve] evolved under the federal courts' inherent authority to manage trials. The purpose of a motion in limine is to allow a court to rule on evidentiary issues in advance of trial in order to avoid delay, ensure an even-handed and expeditious trial, and focus the issues the jury will consider.” However, a motion in limine should be granted only when the evidence is clearly inadmissible on all potential grounds.” *Intelligent Verification Sys., LLC v. Microsoft Corp.*, No. 2:12-CV-525, 2015 WL 1518099, at \*9 (E.D. Va. Mar. 31, 2015), *aff'd sub nom. Intelligent Verification Sys., LLC v. Majesco Entm't Co.*, 628 F. App'x 767 (Fed. Cir. 2016) (citations and internal quotation marks omitted).

#### B. Discussion

1. ECF No. 317: Motion in Limine to Preclude Reference to Named Plaintiff Lonnie Gilbert's Text Message Sent on May 9, 2019 Seeking Money from His Nephew

This Motion seeks to exclude any evidence or testimony regarding the substance of a text message Plaintiff Gilbert sent to his nephew. Plaintiffs contend that such evidence is not relevant to any of the claims against Golden Peanut or to its defenses, is impermissible character evidence under Rule 404(b), and is unfairly prejudicial under Rule 403. ECF No. 320. Golden Peanut contends that the content of the message “proposed an insurance fraud scheme”, and therefore is the proper subject of cross-examination of Gilbert under Rule 608(b) tending to show his character for untruthfulness. ECF No. 423. It does not intend to offer extrinsic evidence of such conduct

under Rule 404(b). *Id.* Defendant further argues that any prejudice from such cross-examination does not outweigh its probative value under Rule 403. *Id.* In their reply, Plaintiffs argue that, even under Rule 608(b), the Court must still weigh the unfairly prejudicial impact of the evidence, especially if it involves a single instance of conduct, as is alleged here. ECF No. 454.

Rule 608(b) provides

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness;

As applicable here, the Fourth Circuit has held that in the discretion of the court, specific instances of the conduct of a witness, “if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness ... concerning his character for truthfulness or untruthfulness,” for the purpose of attacking the witness’s credibility. *United States v. Leake*, 642 F.2d 715, 718 (4th Cir. 1981). That discretion is not absolute, however. *Id.* “Rule 608 authorizes inquiry only into instances of misconduct that are ‘clearly probative of truthfulness or untruthfulness,’ such as perjury, fraud, swindling, forgery, bribery, and embezzlement.” *Id.* (citation omitted). Because extrinsic evidence may not be admitted under Rule 608(b) except for a criminal conviction, a “cross-examiner may inquire into specific incidents of conduct, but does so at the peril of not being able to rebut the witness' denials. The purpose of this rule is to prohibit things from getting too far afield-to prevent the proverbial trial within a trial.” *United States v. Bynum*, 3 F.3d 769, 772 (4th Cir. 1993).

Applying these principles, the Court finds that the evidence sought to be elicited from Gilbert on cross-examination is not sufficiently probative of the witness’s character for untruthfulness to outweigh the unfair prejudice admission of such evidence might engender.

Golden Peanut claims that this single text message is evidence of a “proposed [] insurance fraud scheme.” ECF No. 423 at 3. Even if true, review of the deposition transcript where the text message was discussed reveals that this was no more than an idea expressed to Gilbert’s nephew. *See* ECF No. 432, attach. 6 (filed under seal). Golden Peanut does not contend and the evidence does not suggest that Gilbert ever engaged in a single act to bring about this “proposed insurance fraud scheme.” Consequently, rather than demonstrating that Gilbert engaged in “conduct” as required by Rule 608(b), the evidence instead suggests that Gilbert engaged in thoughts which he expressed to his nephew. The nature of this evidence therefore doubtfully qualifies as the type of “conduct” contemplated by Rule 608(b), and in the Court’s judgment is not sufficiently probative of Gilbert’s character for untruthfulness under the Rule. Moreover, the unfair prejudice of raising the specter of a “proposed insured fraud scheme” from a single text message outweighs the scant probative value such evidence under Rule 403.

Under these circumstances, in accordance with the discretion afforded the Court by Rule 608(b), Plaintiffs’ Motion, ECF No. 317, is GRANTED.

2. ECF No. 331: Motion in Limine to Preclude Reference to Plaintiffs’ Socially Disadvantaged, Limited Resource and Beginning Farmer or Rancher Certifications and Changes in Racial Identification

The subject of this Motion is Golden Peanut’s apparent intention to cross-examine Plaintiffs Dustin Land and Mark Hasty regarding their efforts to “chang[e] their racial identification from White to Native American for the purpose of obtaining financial benefits from the USDA [United States Department of Agriculture].” ECF No. 423 at 2. Plaintiffs seek relief through this Motion on the grounds that the unfair prejudice outweighs the probative value of such evidence, contending it would create a side issue on the subject of race totally unrelated to any of the claims or defenses in this case. ECF No. 335. Golden Peanut argues that this evidence is

properly the subject of cross-examination under Rule 608(b) bearing on the witnesses' character for untruthfulness, and it does not intend to offer extrinsic evidence of such conduct under Rule 404(b). ECF No. 423.

Under Rule 608(b) as discussed *supra*, "specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" are admissible on cross-examination "*if they are probative* of truthfulness or untruthfulness." (emphasis added). Golden Peanut fails to explain in any detail how or why this evidence bears on Land's or Harty's character for untruthfulness. The deposition excerpt attached, ECF No. 432, attach. 8 (filed under seal), fails to demonstrate evidence of untruthfulness. The witness Hasty describes his actions and the USDA's response, which apparently constituted USDA's acceptance of such actions. *Id.* Given the testimony offered by the witness, under Rule 608(b) Golden Peanut is foreclosed from offering any extrinsic evidence which might tend to rebut or disprove such testimony. Since the testimony itself is not sufficiently relevant to Lands' or Hasty's character for untruthfulness, there is no other basis on which it may be admitted.

Moreover, testimony about these Plaintiffs' representations regarding their racial identity is, as Plaintiffs' contend, fraught with the potential to create such a distracting side issue that it would create a danger to unfairly prejudice Plaintiffs, confuse the issues, mislead the jury, unduly delay the proceedings, and waste time in violation of Rule 403. *See Leake*, 642 F.2d at 718 ("The rule [608(b)] recognizes that the trial court must have discretion to apply the overriding safeguards of rule 403 (excluding evidence if its probative value is substantially outweighed by dangers of prejudice, confusion or delay) and rule 611 (barring harassment and undue embarrassment of a witness)"); *see also Christovich v. Pierce*, 59 Fed. Appx. 543, 547 (4<sup>th</sup> Cir. 2003) ("In determining whether to admit testimony under Rule 608(b), a district court must still conduct a Rule 403

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